Supreme Court, U.S.
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No. 05-927

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF THE BLIND;
SPECIAL OLYMPICS MARYLAND, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a Federal Trade Commission regulation applicable to some but not all charitable solicitations permitted to be underinclusive under the First Amendment to the Constitution because that underinclusiveness is caused by the Commission's lack of jurisdiction over non-profit organizations?

Does the regulation otherwise violate First Amendment protections of fully-protected speech by charitable organizations?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The caption to this case contains the names of all parties. Petitioners have no parent corporations and as a non-profit organization are not owned by any publicly-held company pursuant to Supreme Court Rule 29.6.

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CITATIONS OF ORDERS ENTERED IN CASE

1. *National Federation of the Blind and Special Olympics Maryland, Inc. v. Federal Trade Commission*, 303 F. Supp. 2d 707 (D. Md. 2004) v
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JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on August 26, 2005. A petition for rehearing and rehearing en banc was denied on October 25, 2005 (Appendix, Infra, 1a). The jurisdiction for this Court is evoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The pertinent provisions of the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 *et seq.*, and the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 *et seq.*, are reprinted in an appendix to this petition. App., *Infra*, 72a-113a.

The Crimes Against Charitable Americans section of the USA PATRIOT Act reads:

> CRIMES AGAINST CHARITABLE AMERICANS.
>
> (a) Short Title.—This section may be cited as the "Crimes Against Charitable Americans Act of 2001".
>
> (b) Telemarketing and Consumer Fraud Abuse. —The Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6101 et seq.) is amended—
>
> (1) 15 U.S.C. 6102 in section 3(a)(2), by inserting after "practices" the second place it appears the following: "which shall include fraudulent charitable solicitations, and";
>
> (2) in section 3(a)(3) —
>
> (A) in subparagraph (B), by striking "and" at the end;
>
> (B) in subparagraph (C), by striking the period at the end and inserting "; and"; and
>
> (C) by adding at the end the following:
>
> "(D) a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made."; and

(3) 5 U.S.C. 6106 in section 7(4), by inserting, "or a charitable contribution, donation, or gift of money or any other thing of value," after "services".

(c) Red Cross Members or Agents.—Section 917 of title 18, United States Code, is amended by striking "one year" and inserting "5 years".

(d) Telemarketing Fraud.—Section 2325(1) of title 18, United States Code, is amended—

(1) in subparagraph (A), by striking "or" at the end;

(2) in subparagraph (B), by striking the comma at the end and inserting ; "or";

(3) by inserting after subparagraph (B) the following:

"(C) a charitable contribution, donation, or gift of money or any other thing of value,"; and

(4) in the flush language, by inserting "or charitable contributor, or donor" after "participant".

107 P.L. 56, §1011 (2001).

STATEMENT OF FACTS

1. In 1994, Congress enacted the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 *et seq.* ("Telemarketing Act"). The statute authorized the FTC to regulate deceptive and abusive commercial telemarketing acts and practices intended to induce the purchase of goods or services. 15 U.S.C. § 6102(a)(3)(C), App. 72a.

2. Congress mandated that no activity outside the jurisdiction of the FTC Act shall be affected by the Telemarketing Act. 15 U.S.C. § 6105(a), App. 80a.

3. The FTC promulgated regulations in 1995. *See* 60 Fed. Reg. 43842 (Aug. 23, 1995) (codified at 16 C.F.R. §§ 310.1 et seq.) ("TSR"). The FTC's Statement of Basis and Purpose states that: "[t]he FTC Act itself establishes exemptions from its coverage, and the Telemarketing Act provides that

authority under the Rule may be no broader than under the FTC Act." *Id.* at 43843. These regulations did not apply to charitable fundraising telephone calls.

4. Congress enacted the USA PATRIOT Act in October, 2001. Section 1011 of the USA PATRIOT Act is entitled "Crimes Against Charitable Americans" and was introduced by Sen. Mitch McConnell (R-KY). Section 1011(b)(1) of the USA PATRIOT Act directed the FTC to promulgate regulations to prevent "deceptive telemarketing acts or practices" including "fraudulent charitable solicitations." Section 1011(b)(2) directed the FTC to promulgate regulations which shall include:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Section 1011(b)(3) altered the definition of "telemarketing" in the Telemarketing Act by inserting the language "or a charitable contribution, donation, or gift of money or any other thing of value." This language is not otherwise limited in the regulation, although the FTC has explained it does not include political fundraising or solicitations within "charitable contribution" such that this section applies to political calling. 68 Fed. Reg. 4580, 4589 n. 106 (Jan. 29, 2003.)

5. The USA PATRIOT Act did not amend the FTC Act to give it jurisdiction over non-profits:

> [n]otwithstanding its amendment of these provisions of the Telemarketing Act, neither the text of Section 1011 nor its legislative history suggest that it amends Sections 6105(a) of the Telemarketing Act—the provision which

> incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR.

67 Fed. Reg. 4492, 4496, col. 3 (Jan. 30, 2002).

6. In October 2003, the FTC adopted amended regulations implementing this law by amending the TSR. The TSR imposes three substantive restrictions on charitable fundraising calls delivered by professional representatives (but not on charitable fundraising calls conducted by a charity's employees or volunteers):

> 1) regulates "abandoned" outbound telephone calls initiated by a charity through a compensated agent,
>
> 2) requires transmission of caller identification calls for charities' calls delivered through a compensated agent, and
>
> 3) demands acquisition of expensive technology that delivers a recorded message in the event of an "abandoned call."

7. A violation of the TSR is subject to enforcement by the FTC as an unfair or deceptive act or practice, including penalties of $11,000 per violation. 15 U.S.C. § 6102(c), App. 73a. The Telemarketing Act also permits enforcement by a state and civil actions by aggrieved private persons. 15 U.S.C. §§ 6102(a), 6103(f), 6104(a), App. 72a, 77a, 78a.

8. The FTC lacks jurisdiction over the following types of commercial entities: supervised banks, common carriers and common non-profit organizations. 15 U.S.C. § 6105(a), App. 80a. The FTC also lacks jurisdiction over all calls placed in intrastate commerce. 15 U.S.C. § 6106(4), App. 81a; 68 Fed. Reg. at 4587.

9. The FTC has interpreted the abandonment provision of the TSR to bar prerecorded telephone calls on behalf of charities because such calls are not connected to a "sales representative" but rather a prerecorded message. *The Broad-*